IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.213 OF 2005

Indian Card Clothing Co. Ltd. .. Appellant

vs.

Atur Rubber Products & Ors. .. Respondents.

Mr.V.R.Walavalkar i/b. Crawford Bayley for the Appellant.

Mr.Uday Warunjikar for the Respondent.

CORAM : A.S.OKA, J.

DATED : 5th April, 2005.

P.C. :

1. Heard Counsel appearing for the parties. The Appeal is by the Original Plaintiff which takes exception to Judgment and Order dated 4.12.2004 passed by the learned Trial Judge by which application made by the Appellant/Plaintiff at exhibit 30 was rejected. The prayer in the said application is for directing the Respondents/Defendants to forthwith return the machinery which is in the custody of the Respondents/Defendants.

2. The learned Counsel appearing for the

Appellant invited my attention to the earlier application made for similar relief and order of rejection passed thereon by the learned Trial Judge dated 17.3.2004. He pointed out that the prayer made in the earlier application was rejected on the basis of statement made by the Respondents that the machinery was in proper condition. He invited my attention to the inspection report of M/s. Amol Bora & Company filed by the Appellant and the Inspection report of one S.M.Tilve filed by the Respondents. He submitted that the inspection report submitted by M/s. Amol Bora & Company shows that the machinery is kept idle for last more than 18 months and it requires repairs/overhauling. From the report submitted by Shri Tilve he has pointed out that the machinery is not being used. He submitted that in view of the changed circumstances the learned Trial Judge should have allowed the application at Exhibit 30 especially when the Appellant/Plaintiff had offered to furnish corporate guarantee in favour of Respondent No.1 for sum of Rs.36,00,000/- which is the value of the machinery.

3. Shri Warunjikar, appearing for the Respondents submitted that in the plaint there is no prayer made for return of the machinery. On

instructions, Shri Warunjikar stated that the machinery in question is being regularly used by the Respondents and the Respondents have been maintaining the machinery in proper condition and in future also they will continue to do so.

4. I have considered the rival submissions. It will be necessary to refer to the prayers made in the plaint by the Appellant. The prayers reads thus:

> a) The Defendants be jointly and severally ordered and decreed to pay the Plaintiff a sum of Rs.2,06,811.42 (Rupees Two Lakhs Six Thousand Eight Hundred Eleven and Forty Two Paise) together with interest on the sum of Rs.1,89,735.25 @ 18% p.a. from the date of this suit till payment and realization thereof.
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> b) The Defendants be jointly and severally ordered and decreed to pay to the Plaintiff mesne profits of Rs.45,000/- per month along with interest at 18% p.a. from September 01, 2002 onwards till release of the machinery to the Plaintiff.
>
> c) Pending the hearing and final disposal of the suit, the Defendants be ordered and directed to return to the Plaintiff or its nominee the machinery viz. Three Roll Vertically 'I' type Calendar Machine, Tensile Testing Machine, Dough Mixer, Industrial Oven, belonging to the Plaintiff in the possession of the Defendants."

4. Thus, it is apparent that there is no substantive prayer made in the suit for a decree directing the Respondent to return the machinery. The second prayer is for payment of Rs.45,000/- per month till the release of machinery in favour of the Appellant. There is no court fee paid on the prayer for return of machinery in accordance with Section 6 (iii) of the Bombay Court Fees Act, 1959 payable on a prayer for return of movable property. The prayer for return of machinery is by way of interim relief.

5. Perusal of the plaint shows that under agreement between the parties, the machinery has been been handed over to the Respondents. The claim in the suit is for outstanding contractual dues with interest.

6. Prima facie there is some substance in the submission of the learned Counsel for the Respondents that if in the plaint the substantive relief of return of the machinery is not prayed for, by way of interim relief such a prayer could not have been granted.

7. Apart from this aspect, perusal of order dated 19.3.2004 passed on the earlier application

made by the Appellant Plaintiff shows that the prayer made therein was not rejected only on the ground that the learned Counsel for the Respondents stated that the machinery is in proper condition. The learned Trial Judge has held that considering the rival claims of the parties it was not proper to hand over the said machinery to the Appellant Plaintiff unless and until the matter is resolved fully on merits. In fact this is the main reason given by the learned Trial Judge for rejecting the earlier application.

8. If the earlier application made by the Appellant Plaintiff for similar relief is rejected by giving aforesaid reason, the Appellant/Plaintiff cannot come out with a fresh application on the ground that machinery is not properly maintained and it requires repairs. The statement made by the learned Counsel for the Respondents that the machinery will be maintained properly is accepted. Even assuming that the Respondents have damaged the machinery, the remedy of the Appellant/Plaintiff of claiming compensation/damages is always open. In this view of the matter, I find that the learned Judge was justified in dismissing the application at Exhibit-30. There is no merit in the appeal and the

same is dismissed with no order as to costs.

(A.S.Oka, J.)